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Supreme Court of the United States

OCTOBER TERM, 1965

No. 654

N. V. NEDERL. AMERIK STOOMV. MAATS,

Petitioner,

against

ANTHONY ALBANESE and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. .....

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Petitioner,

against

ANTHONY ALBANESE and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, N. V. Nederl. Amerik Stoomv. Maats., respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 15, 1965, which reversed the judgment entered in the United States District Court for the Southern District of New York on April 7, 1964 in favor of the plaintiff-respondent Anthony Albanese against petitioner, in the amount of $145,000.00, and in favor of third-party defendant-respondent International Terminal Operating Co., Inc., dismissing petitioner's third-party complaint for indemnity against that respondent and remanded both actions for retrial.

This petition is filed as a cross-petition to petitions heretofore filed herein by the respondent, Anthony Albanese,

for a writ of certiorari, which bears No. 523 on the Docket of this Court, and by respondent, International Terminal Operating Co., Inc., which bears No. 557 on the Docket of this Court.

The opinion of the Court of Appeals for the Second Circuit, filed June 15, 1965, is reported at 346 F. 2d 481.

Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1965. The time of this petitioner to file a petition for a writ of certiorari in this cause has been extended to October 18, 1965 by order of the Honorable John M. Harlan, Associate Justice of this Court, dated September 15, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254(1) and 2101(c).

Questions Presented

I

Does a ship become unseaworthy because an injury-producing condition is created within the hold of the vessel by the exhaust of hilos, not in themselves defective, placed within the hold by the stevedore for use in cargo loading operations?

Fairly comprised within this question are the following subsidiary questions:

(1) Are hilos so brought aboard a vessel adopted as a matter of law by the ship as its own equipment?

(2) Does the warranty of seaworthiness include the obligation to provide a longshoreman with a safe place to work?

(a) Under the reasonable fitness doctrine, can the hold of a vessel be found unseaworthy where only 1 of 18 men employed in the hold is affected by the exhaust and there is no proof that the carbon monoxide content of the hold exceeded allowable safe limits?

II

May a shipowner be held liable in negligence for failing to give a safe place of work to the employee of an independent contractor who is injured by reason of the methods employed by the independent contractor in performing its work?

III

Where a longshoreman is injured by carbon monoxide fumes exhausted from hilos employed by a stevedore in performing loading operations aboard a vessel, can the stevedore be relieved of the performance of its warranty of workmanlike service by belatedly requesting through subordinate employees that a vessel's forced ventilation system be put into operation after the workmen began to complain of the density of fumes and within fifteen minutes of the happening of the injury?

Statement of the Case

Respondent, Anthony Albanese, a longshoreman in the employ of respondent, third-party defendant, International Terminal Operating Co., Inc., claims that on February 25, 1961 he sustained personal injuries as a result of carbon monoxide poisoning while working in the lower No. 2 hold of petitioner's vessel, the M. S. SCHIEDYK.

The plaintiff, together with 8 other men, comprising the No. 2 gang, had been working in the lower No. 2 hold of the vessel since approximately 8:00 A. M. (App. to Deft.-Appellant's Brief, pp. 69a, 190a, 236a, 237a). During all

of this time a hilo, owned by third-party defendant, which had been placed in the lower No. 2 hold, had been in continuous operation (App. to Deft.-Appellant's Brief, pp. 69a, 170a, 237a-238a). At about 10:45 A. M. a second gang of stevedores, comprised of 9 men, identified as the No. 7 gang, began working a hilo in the after half of the upper 'tween deck (App. to Deft.-Appellant's Brief, pp. 64a, 74a, 125a, 134a, 141a, 163a). This second hilo had been in operation for 10 to 15 minutes when the longshoremen began to make complaints of the density of smoke and fumes in the hold. Then, for the first time, was any request made for the ship's forced ventilating system to be put in operation (App. to Deft.-Appellant's Brief, pp. 129a, 137a, 155a, 156a, 164a-165a, 171a). The entire time interval from the time the request was allegedly made until the plaintiff had been removed from the hatch was less than 15 minutes (App. to Def.-Appellant's Brief, pp. 131a, 136a, 138a, 139a).

The ship was euipped with a Cargo Caire system which is designed primarily for the ventilation and dehumidifying of cargo while the vessel is at sea with the hatches closed (App. to Deft.-Appellant's Brief, pp. 178a-179a, 60a). It can, however, serve as a forced ventilating system during the course of the loading of cargo (App. to Deft.-Appellant's Brief, pp. 209a, 60a, 251a-252a).

Third-party defendant maintained on the pier portable blowers for the purpose of exhausting fumes when hilos were working in the hold (App. to Deft.-Appellant's Brief, pp. 242a, 243a), and these blowers were, under the instructions of the stevedore, supposed to be put in operation whenever hilos were used (App. to Deft.-Appellant's Brief, p. 243a).

Third-party defendant's ship's bosses assigned to the over-all supervision of the steveloring operations on board ship (App. to Deft.-Appellant's Brief, pp. 237a-238a, 226a), had been instructed and directed to make periodic tests of

the atmosphere in the holds where hilos were working, for which purpose instruments were maintained by I.T.O. in the pier superintendent's desk on the pier (App. to Deft.-Appellant's Brief, pp. 244a-248a).

At about 10:10 A. M. one of the stevedore bosses was observed in the lower No. 2 hold with this instrument (App. to Deft.-Appellant's Brief, pp. 172a-173a), but whether he made any tests or what were the results of the tests was not disclosed.

It was stipulated that the Cargo Caire system was adequate for the ventilation of the hold (App. to Deft.-Appellant's Brief, pp. 253a-254a), and there is no proof whatever that the system was inoperable or in any wise defective. The proof without contradiction is that no portable blowers had been brought aboard the ship or put in operation by the third-party defendant prior to plaintiff's injury (App. to Deft.-Appellant's Brief, pp. 135a-136a, 149a-150a, 154a, 166a, 172a). It was stipulated that none of the longshoremen, other than the plaintiff, in either plaintiff's gang or the No. 7 gang made any claim of having been affected by carbon monoxide (App. to Deft.-Appellant's Brief, p. 130a). The stevedore's superintending personnel had no knowledge of any such incident (App. to Deft.-Appellant's Brief, pp. 240a-242a, 245a) and their record of the accident indicates merely that plaintiff was overcome as he was leaving the hold for lunch (Ex. F, reproduced at p. 283a, App. to Deft.-Appellant's Brief, introduced at p. 231a).

Carbon monoxide does not become suddenly toxic and overpowering but produces its effects after continued exposure to a sufficiently high concentration over an extended period of time (App. to Deft.-Appellant's Brief, pp. 81a, 83a, 102a, 103a). .01% is considered a safe working condition by the U. S. Department of Labor, and plaintiff's medical expert, Dr. Kaplan, testified that it required exposure to .2% for an hour to make a person seriously ill (App. to Deft.-Appellant's Brief, p. 83a).

Mechanical ventilating systems, such as the Cargo Caire system, are not usually or customarily required on cargo carrying vessels (App. to Deft.-Appellant's Brief, pp. 251a-252a). There is no such equipment on the many thousands of Liberty ships which are still in operation (App. to Deft.-Appellant's Brief, pp. 261a-262a). In the port of New York, it is customary for stevedoring companies to maintain their own portable blowers for the purpose of exhausting any fumes from hilos brought aboard vessels to assist in cargo loading and discharging operations (App. to Deft.-Appellant's Brief, p. 263a).

The Trial Court, denying defendant-petitioner's motion for a directed verdict against plaintiff (App. to Deft.-Appellant's Brief, pp. 269a-270a; cf. 184a-188a), submitted the case to the jury as between plaintiff and defendant on the issues of both negligence and unseaworthiness. As to seaworthiness, the question submitted to the jury was whether "there was a dangerous accumulation of carbon monoxide fumes in the No. 2 hold which rendered the vessel unseaworthy", and in that connection the jury was charged that they "must determine whether, considering the place and the nature of the work, the area was reasonably fit to permit the plaintiff to perform his tasks with reasonable safety" (App. to Deft.-Appellant's Brief, p. 19a). In this connection the Court also charged the jury that: "The hilos, though brought aboard by the longshoremen, are adopted as a matter of law by the ship as its own equipment" (App. to Deft.-Appellant's Brief, p. 20a), and that "the ship-owner's obligation to provide a seaworthy vessel includes the obligation to provide plaintiff with a reasonably safe place to work" (App. to Deft.-Appellant's Brief, p. 21a). The Court also charged that "failure by the shipowner to put such equipment (the ventilating system) in effective operation under the existing conditions which prevail here, if you so find, would warrant the finding by you that the vessel was unseaworthy" (App. to Deft.-Appellant's Brief, p. 21a).

On defendant-petitioner's motion for a directed verdict against third-party defendant in the event the jury should return a verdict in favor of the plaintiff, the Court, neither denying nor reserving, said: "The Court will deal with that matter in the course of the charge" (App. to Deft.-Appellant's Brief, p. 271a) In submitting the indemnity claim to the jury, the Court however left it to the jury as a question of fact whether or not the stevedore actually knew or should have known that the use of hilos would create a dangerous condition (App. to Deft.-Appellant's Brief, p. 31a) charging that: "Should you find that complaints were made to a ship's officer as soon as the dangerous condition was known or should reasonably have been known by the stevedore, and if you find that the ship's officer directed or requested the longshoremen to continue working under these conditions with the added assurance that the dangerous condition would be promptly and entirely eliminated, then you may find that the stevedore acted to protect its men; and, in that event, the shipowner is not entitled to recover indemnity" (App. to Deft.-Appellant's Brief, pp. 32a, 33a). There was no proof whatever of any assurance "that the dangerous condition would be promptly and entirely eliminated."

Reasons for Granting the Writ

A—As to unseaworthiness.

On the issue of unseaworthiness, the Court of Appeals held that there might have been evidence sufficient to base a verdict upon unseaworthiness, though not compelling such a verdict, on the theory that the ship had become unseaworthy "because of a dangerous condition created by noxious fumes in the hold" (346 F. 2d 481 at p. 483). In this respect the decision of the Court of Appeals is in conflict with the decisions of this Court in *Morales* v. *City of Galveston,* 370 U. S. 165, reh. den. 371 U. S. 853, and *Gutierrez* v. *Waterman S.S. Corp.,* 373 U. S. 206. In *Morales* this

Court specifically held that the condition of the atmosphere in the hold of the vessel, created by toxic fumes imported into the vessel by cargo which was in the process of being loaded, did not render the vessel unseaworthy even though the vessel had no mechanical ventilating equipment to exhaust fumes. The basis of the Court's decision apparently was that for unseaworthiness to exist, there must be a defect in the vessel itself, its hull, appurtenances, stow or personnel; that unseaworthiness does not consist of a condition *in* the vessel but a condition *of* the vessel. This is further emphasized by this Court in *Gutierrez,* wherein this Court, at page 213, wrote as follows:

> "These cases all reveal a proper application of the seaworthiness doctrine, which is in essence that things about a ship, whether the hull, the decks the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used."

In that case, distinguishing the decision of this Court in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.,* 369 U. S. 355, from *Morales,* this Court said (373 U. S. at p. 213, Footnote 4):

> "4. The Ellerman Case was cited with approval in the later decision, Morales v. Galveston, 370 U. S. 165, 170, and the majority of the Court in Morales, with one exception, joins the majority here. Morales, of course, did not involve the unseaworthiness of cargo containers, but rather that of a ship's hold."

In *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539, this Court carefully pointed out that the doctrine of unseaworthiness does not rest upon tort notions of knowledge or notice, actual or constructive, but solely and exclusively upon the existence of a condition which can be held to constitute unseaworthiness within the meaning of the term as defined in the case law.

If by reason of the existence of toxic fumes and the absence of mechanical ventilating equipment to keep the hold free of such fumes, the vessel was not unseaworthy in *Morales*, upon what basis can the vessel be held to have been unseaworthy in the present case?

The test of seaworthiness, as stated by this Court in *Mitchell*, *Morales*, *Ellerman* and *Gutierrez*, is reasonable fitness. If a vessel which had no mechanical ventilating equipment was nevertheless reasonably fit in *Morales*, how can a vessel which had adequate ventilating equipment be not reasonably fit in the case at bar? Unseaworthiness cannot be imputed, although so charged by the District Court in this case, from the mere fact that the ventilating equipment was not put in use, for liability in that respect involves concepts of negligence, not of unseaworthiness. Cf. *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96; *Ezekiel* v. *Volusia S.S. Co.* (CA 2), 297 F. 2d 215, cert. den. 369 U. S. 843; *Pinto* v. *States Marine Corp. of Del.* (CA 2), 296 F. 2d 1, cert. den. 369 U. S. 843, reh. den. 369 U. S. 891; *Imperial Oil Ltd.* v. *Drlik* (CA 6), 234 F. 2d 4, cert. den. 352 U. S. 941.

If any unfit condition existed in the hold under the proof in this case, it is beyond contradiction that the condition did not exist at the commencement of the work, but arose at a subsequent period of time by reason of the use by the stevedore of hilos in the performance of its work.

Under these circumstances, the only basis upon which the shipowner could be held liable for unseaworthiness is that either the hilos brought aboard a vessel are adopted as a matter of law by the ship as its own equipment, or because the warranty of seaworthiness includes an absolute obligation to provide a longshoreman with a safe place to work, which are precisely the bases upon which the District Court instructed the jury that unseaworthiness could be found in the case at bar.

While it is true that in *Alaska S.S. Co.* v. *Petterson*, 347 U. S. 396, the ship was held to be unseaworthy where equipment brought aboard by a stevedore was actually incorporated into and made a part of the ship's equipment, this decision has not been understood or interpreted as extending to equipment employed by stevedores not integrated with the ship's own equipment. *Forkin* v. *Furness Withy & Co.* (CA 2), 323 F. 2d 638, *Carabellese* v. *Naviera Aznar, S.A.* (CA 2), 285 F. 2d 355, cert. den. 365 U. S. 872; *McKnight* v. *N. M. Paterson & Sons, Limited*, 181 F. Supp. 434, aff'd (CA 6), 286 F. 2d 250, cert. den. 368 U. S. 913; *Sherbin* v. *S. G. Embiricos, Ltd*, 200 F. Supp. 874; *Deffes* v. *Federal Barge Lines, Inc.*, 229 F. Supp. 719.

The principle is also widely recognized that where an injury to a longshoreman results from the stevedore's handling of equipment which is not in itself defective if properly handled, the ship is not liable under the unseaworthiness doctrine. *Mosley* v. *Cia. Mar Adra, S.A.* (CA 2), 314 F. 2d 223, cert. den. 375 U. S. 829, 835; *Puddu* v. *Royal Netherlands S.S. Co.* (CA 2), 303 F. 2d 752, cert. den. 371 U. S. 840, reh. den. 371 U. S. 917; *Bilieci* v. *United States* (CA 9), 298 F. 2d 703; *Morrell* v. *United States* (CA 9), 297 F. 2d 662; *Arena* v. *Luckenbach S.S. Co., Inc.* (CA 1), 279 F. 2d 186, cert. den. 364 U. S. 895.

In the instant case the hilos concededly were not in themselves defective in any way so as to render the ship unseaworthy, even if they could be assumed to be incorporated into and made a part of the ship's gear. It would appear, therefore, that the only way in which the ship could be held liable for unseaworthiness in the instant case would be that the shipowner owes to a longshoreman an absolute obligation to provide him under any and all circumstances with a safe place of work. The notion that there can be any absolute obligation on the part of a shipowner to furnish workmen of an independent contractor with a safe place of work was conclusively set at rest by

this Court in *West* v. *United States*, 361 U. S. 118, when it said (p. 122): "Other than the doctrine of seaworthiness, * * * there is no basis of liability apart from fault."

To import unseaworthiness from the mere fact that the longshoreman's place of work becomes unsafe, would make a vessel owner the guarantor or insurer of the safety of employees of an independent contractor, even though the independent contractor, by its own methods of work, renders the work place unsafe and even though the unsafe condition in no way affected the vessel, its hull, decks, machinery, fixtures, appurtenances, cargo stow or cargo containers. This would be an incredible rule of law, and yet that is precisely the burden which is imposed upon the shipowner in the present case under the charge of the District Court (App. to Deft.-Appellant's Brief, p. 21a).

In the present case the plaintiff was the only one of 18 men employed in the hold who claims to have been affected by the carbon monoxide. There was no proof as to what the carbon monoxide content of the hold was, or that it had exceeded allowable safe limits. The doctrine of unseaworthiness imports no more than that the vessel owner must supply a ship reasonably fit for the purposes of its intended use. The test is not whether a vessel is reasonably fit for a particular longshoreman with whatever his idiosyncrasies or susceptibilities to injury; yet in the present case the charge of the District Court to the jury allowed them to find unseaworthiness proximately causing plaintiff's injury if in fact the area was not "reasonably fit to permit plaintiff to perform his tasks with reasonable safety" (App. to Deft.-Appellant's Brief, p. 19a). This is a test, not of reasonable fitness for intended use, but of reasonable fitness for a particular person. The proof shows that carbon monoxide may have varying effects on different persons according to a person's own peculiarities.

B—As to a safe place of work.

Whether or not, as stated by the Court of Appeals, a finding of defendant's negligence would be justified "if the hatch bosses sometime between 10:55 and 11:05 A. M. asked a ship's officer to turn on the ship's ventilating system and he agreed to do so" (346 F. 2d at p. 483), the fact is that the case was not submitted to the jury on any such basis, and that no request was made by the plaintiff to submit the case on any such basis. The only and sole basis upon which the case was submitted to the jury in negligence was that the shipowner owed to the plaintiff "the duty to use reasonable care to see that the hold area was a reasonably safe place in which to work" (App. to Deft.-Appellant's Brief, p. 14a-15a).

That there is no such duty upon a shipowner in respect of an employee of an independent contractor who has been employed by the shipowner to perform specific services on the vessel, where the injury arises out of the methods employed by the independent contractor, has been adjudicated by this Court in *West* v. *United States,* 361 U. S. 118, 123. This has consistently been the rule of law in negligence enunciated by the Court of Appeals for the Second Circuit over a long period of time, as to which this Court has consistently denied certiorari. *Gallagher* v. *United States Lines,* 206 F. 2d 177, cert. den. 346 U. S. 897, reh. den. 346 U. S. 940; *Filipek* v. *Moore-McCormack Lines, Inc.,* 258 F. 2d 734, cert. den. 359 U. S. 927; *Puddu* v. *Royal Netherlands S.S. Co.,* 303 F. 2d 752, cert. den. 371 U. S. 840, reh. den. 371 U. S. 917. This is also the ordinary common law rule. *Hess* v. *Bernheimer & Schwartz Brewing Co.,* 219 N. Y. 415, 418-419; *Iacono* v. *Frank & Frank Contracting Co.,* 259 N. Y. 377, 381; *Gallagher* v. *United States Lines,* 206 F. 2d 177, 179; *Wallach* v. *United States,* 291 F. 2d 69, 70, cert. den. 368 U. S. 935; *Zucchelli* v. *City Construction Co.,* 4 N. Y. 2d 52; *Gasper* v. *Ford Motor Co.,* 13 N. Y. 2d 104; *Wright* v. *Belt Associates, Inc.,* 14 N. Y. 2d 129, 134.

C—As to indemnity.

A stevedore's implied warranty of workmanlike performance is absolute and is imposed whether a stevedore's conduct would render it liable in tort or not. *Italia Societa per Azione de Navigazione* v. *Oregon Stevedoring Company, Inc.*, 376 U. S. 315. In that case this Court held the stevedore liable to indemnify the shipowner where one of its employees was injured without any negligence on its part, by reason of a defective rope supplied by the stevedore, attached to a hatch tent, even though the stevedore had no knowledge of the defect, citing *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 and *Crumady* v *The Joachim Hendrik Fisser*, 358 U. S. 423. This Court in *Italia* held that the stevedore's warranty "extends not only to the stowage and handling of cargo but also to the use of equipment incidental thereto" and that "the shipowner's negligence is not fatal to recovery against the stevedore" (*Id.*, pp. 319-320).

In *Italia*, as in the landmark case in the field of maritime indemnity of *Ryan* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, this Court likened the stevedore's warranty of workmanlike service to "a manufacturer's warranty of the soundness of its manufactured product" (*Id.* p. 318).

In view of the nature of the stevedore's warranty of workmanlike service, it would seem clear beyond peradventure of dispute that in the instant case, if any basis existed for holding the shipowner liable, either in negligence or in unseaworthiness, an even wider basis existed to entitle the shipowner to indemnity from the stevedore as a matter of law. If the stevedore is held liable to indemnify the shipowner where an instrumentality supplied by it is defective, even though it has no knowledge thereof, how can a stevedore escape liability where it is itself not free from fault, the instrumentality which causes the injury is furnished by it, and the injury-producing conditions should have been known to it if attentive to its obligations?

While it is true that in *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, this Court indicated that there is an area of "conduct on (the shipowner's) part sufficient to preclude recovery", it is quite clear from *Crumady* that not even the giving to the stevedore of unseaworthy or defective equipment for use in its work will defeat indemnity. It has been consistently held that this is insufficient to defeat indemnity where the stevedore knew, or should have known, of the defect. *Revel* v. *American Export Lines,* 162 F. Supp. 279, aff'd 266 F. 2d 82 (CA 4), cited by this Court in *Italia* (Footnote 9, p. 323); *Calmar S. S. Co.* v. *Nacirema Operating Co.* (CA 4), 266 F. 2d 79, cert. den. 361 U. S. 816; *Smith* v. *Jugosalvenska Linijska Plovidea* (CA 4), 278 F. 2d 176; *Drago* v. *A/S Inger* (CA 2), 305 F. 2d 139; *Pettus* v. *Grace Line, Inc.* (CA 2), 305 F. 2d 151; *Williams* v. *Pennsylvania R. R. Co.* (CA 2), 313 F. 2d 203; *Misurella* v. *Isthmian Lines, Inc.* (CA 2), 328 F. 2d 40.

The area of conduct on the part of the shipowner which can defeat indemnity, as set forth in *Hugev* v. *Dampskisaktieselskabet International* v. *Metropolitan Stevedore Co.*, 170 F. Supp. 601, aff'd 274 F. 2d 875, cert. den. 363 U. S. 803, cited by this Court in *Italia* (Footnote 9, p. 323), is limited to failure to exercise reasonable care to place the ship, its equipment and appliances in such condition that an expert and experienced stevedore will be able by the exercise of ordinary care to load cargo with reasonable safety, and to give the stevedore reasonable warning of the existence of any latent or hidden dangers not usually encountered or reasonably to be expected by an expert and experienced stevedore, of which the shipowner had or should have had knowledge and which the shipowner could reasonably expect the stevedore to encounter in the performance of its work (170 F. Supp. at pp. 610-611).

Thus the cases where a shipowner has been denied indemnity fall into two categories:

(1) Those where the shipowner has failed to give warning relating to a hidden danger such as is not usually encountered by an expert and experienced contractor, of which the shipowner knew or should have known, and which the contractor, by the exercise of reasonable care, could not have discovered, as in *Moore-McCormack Lines, Inc.* v. *Maryland Ship Ceiling Co.*, 311 F. 2d 663.

(2) Those where there is a defect in ship's hull or equipment which the shipowner is required to keep in good condition and where there is given assurance by the ship that the equipment is in safe condition for use, as in *Hudson S. S. Co.* v. *Ayala Colon* (CA 1), 314 F. 2d 44, *Hodgson* v. *Lloyd Brasileiro Patrimonio Nacional* (CA 3), 294 F. 2d 32 and *United States* v. *Harrison* (CA 9), 245 F. 2d 911.

In the present case, we have on the contrary a condition of the longshoremen's work area created by instrumentalities provided by the stevedore, the effects of which were either known, or should have been known, to the stevedore, the testing of the harmful effects of which was a prescribed obligation imposed by the stevedore upon its supervisory personnel on board the ship, and for the prevention of which harmful effects the stevedore maintained preventive means in the way of portable blowers which, according to its prescribed procedures, were always and without variation supposed to have been placed at hatches every time a hilo was employed in a hold.

To argue that a belated request by subordinate employees to a mate to put on the ship's forced ventilating system within 15 minutes prior to the time that plaintiff was overcome by the carbon monoxide fumes and after they must already have had injurious effects, creates an issue of fact as to whether the shipowner prevented or hindered the stevedore in the performance of its warranty of workmanlike service, is manifestly unsound. If a stevedore could so escape the effect of a clear breach of its warranty, the warranty would be meaningless. It is submitted that as a

matter of law, such evidence was insufficient to create a jury question whether the shipowner was chargeable with conduct precluding indemnity.

The use of hilos in the holds of vessels is a comparatively recent innovation in the stevedoring industry, resulting from the constantly accelerating process of automation. The incidents of injury from their use can be expected to increase. It is important to the shipping industry to know whether the use of these or other such instruments by stevedores is to have the effect of further enlarging the heavy burden of responsibility already imposed upon the shoulders of shipowners in respect of the employees of their stevedore contractors. If certiorari should be granted in the case, the questions propounded by cross-petitioner should be reviewed by this Court.

There were two other questions raised by petitioner as appellant in the United States Court of Appeals which, because of the decision ordering a new trial, it did not become necessary to pass upon: (a) excessiveness of the plaintiff's verdict and (b) petitioner's right to counsel fees and expenses from third-party defendant, which, in the event this Court should grant certiorari and either modify or reverse the decision of the Court of Appeals, might require disposition by that Court.

CONCLUSION

In the event certiorari is granted in this case, the Court should consider upon its review of the case the questions presented by cross-petitioner.

Respectfully submitted,

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On the Petition.

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